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9 UNITED STATES DISTRICT COURT
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA

11 ANGELOTTI CHIROPRACTIC,
12 INC., et al.,

13 Plaintiffs,

14 v.

15 CHRISTINE BAKER, et al.,

16 Defendants.

Case No. 8:13-cv-01139-GW-JEM

17 **AMICUS BRIEF IN SUPPORT**
18 **OF PLAINTIFF'S REQUEST**
19 **FOR PRELIMINARY INJUNCTIVE**
20 **RELIEF**

21 **Corporate Disclosure Statement**

22 The undersigned states that *amicus curiae*, the *California Society of*
23 *Industrial Medicine and Surgery, Inc.* (CSIMS) is not a corporation that issues
24 stock or has a parent corporation that issues stock. CSIMS is a non-profit
25 organization comprised of individual physicians, medical service providers and
26 medical groups that provide medical-legal evaluation and medical treatment to
27 California's injured workers. Its mission is to assist its members excel in the
28 practice of occupational medicine so as to provide the accurate evaluation and
treatment of California's injured workers.

1 The undersigned states that *amicus curiae*, the *California Workers'*
2 *Compensation Services Association, Inc. (CWCSA)* is also not a corporation that
3 issues stock or has a parent corporation that issues stock. CWCSA is a non-profit
4 organization representing the individuals and entities that provide document
5 recovery, reproduction, retention and management, language interpretation and
6 translation services, medical transportation and other services to assist California's
7 injured workers. Its mission is to assure that California's injured workers have full
8 access to their rights and benefits by promoting the professionalism, ethics and
9 performance of all the support service industries required by the California
10 workers' compensation system.
11

12
13 Dated Oct. 3, 2013

14
15 By:



16 David Leonard, Esq.

17 Attorney For Proposed Amici
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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to their motion to participate in this matter as amici curiae, the *California Society of Industrial Medicine and Surgery, Inc.* (CSIMS) and the *California Workers' Compensation Services Association, Inc.* (CWCSA) submit their brief in support of the plaintiffs and respectfully requests that this Court grant plaintiffs' request for preliminary injunctive relief.

As set forth in the motion to file this brief, CSIMS is a non-profit organization comprised of individual physicians, medical service providers and medical groups that provide medical-legal evaluation and medical treatment to California's injured workers. Its mission is to assist its members to excel in the practice of occupational medicine so as to provide the accurate evaluation and treatment of California's injured workers. CSIMS members routinely file liens pursuant to Labor Code section 4903¹. If a workers' compensation insurance carrier or self-insured employer contests services provided to an injured worker, CSIMS members utilize their liens to assert their rights to payment for services provided. The lien "activation" fee imposed by section 4903.06 directly and adversely impacts CSIMS members.

CWCSA members provide document recovery, reproduction, retention and management, language interpretation and translation services, medical transportation and other services to assist California's injured workers and their attorneys apply the provisions of the California Workers' Compensation Act. CWCSA's members are directly and adversely impacted by the "activation" fee requirements imposed by section 4903.06.

¹ All further statutory references are to the Labor Code unless otherwise indicated.

1 Because the Court's ultimate decision in this case will determine the future
 2 viability of CSIMS and CWCSA members, amici seek to ensure that CSIMS and
 3 CWCSA's members' position in this matter is brought to the Court's attention for
 4 consideration.

6 SOURCE OF AUTHORITY TO FILE AMICUS BRIEF

7 This brief is accompanied by a motion seeking permission to file this brief.
 8 Further supporting the filing of this amici brief is *Neonatology Associates, PA v.*
 9 *CIR*, 293 F.3d 128 (3rd Cir. 2002). Here the court concluded that a broad reading
 10 of Rule 29 is appropriate and that amicus curiae needs only to show "(a) an
 11 adequate interest, (b) desirability, and (c) relevance" *Id.* at 131. (See also *In Re:*
 12 *Heath v. American Express Travel Related Services Company, Inc., et al.*, 331
 13 B.R. 424, 430 (2005 9th Circuit Bankruptcy Appellate Panel).) Amici hope to
 14 provide important assistance to the court by presenting a particular expertise not
 15 possessed by any party and to explain the impact a potential holding will have on
 16 an industry or other group. In the present case, both CSIMS and CWCSA are
 17 professional associations. CWCSA has actively participated in the 2012 regulatory
 18 public regulatory enabling process. CSIMS has regularly appeared as amicus
 19 before the Court of Appeal and the Supreme Court of California. Its members are
 20 directly and adversely impacted by the retroactive creation of a lien "activation"
 21 fee as set forth in section 4903.06.

23 Disclosure

24 No party's counsel authored the brief in whole or in part. No party's
 25 counsel contributed money that was intended to fund preparing or submitting the
 26 brief and no person other than the *amici curiae*, its members, or its counsel
 27 contributed money that was intended to fund preparing or submitting the brief.
 28

LEGAL DISCUSSION

I. Overview of Brief

In this brief, amici will observe that because the lien “activation” fee impairs existing financial contracts, impermissibly extinguishes property interests, and arbitrarily treats participants differently, Section 4903.06 impermissibly violates the lien-holders’ constitutional right to due process, transactional stability in contract, and right to equal protection. It will be concluded that the proposed individual case remedy of section 4903.07 is illusory and of no protection because it does not address the harm caused by the constitutional violations and fails to address the impact of having to pay vast sums of capital by January 1, 2014 to activate current liens to avoid dismissal by operation of law under subsection (a)(5) of section 4903.06.

II. Liens and the California Workers’ Compensation System

California’s Constitution expressly declares as fundamental social public policy that it is the Legislature’s responsibility to create a complete system of workers’ compensation designed to secure that compensation is “expeditiously, inexpensively, and without encumbrance of any character.” (Cal. Const. Article XIV, § 4.) To that extent, California workers’ compensation laws allow injured workers to treat with pre-injury designated physicians and/or to self-procure treatment from a physician of their choice should the employer deny medical liability or be derelict in assisting the injured worker obtain access to appropriate medical care. (§4600, subsections (a)-(d), (*Voss v. WCAB*, 10 Cal. 3d 583, 588 (1974); *Zeeb v. WCAB*, 67 Cal. 2d 496, 501-503 (1967); *McCoy v. Industrial Acc. Com.*, 64 Cal. 2d 82, 86 (1966).)

III. CHSWC Report On Liens

In 2011, California's Commission on Health and Safety and Workers' Compensation (CHSWC)² reviewed the long-term impact of California's lien phenomena and issued a research paper entitled "Liens Report." Based on empirical data, CHSWC made twenty-eight (28) recommendations, to manage the lien back log and address the financial lien assignment complications occurring in California. At no time did CHSWC recommend that an "activation" fee be imposed upon previously filed liens. Based on empirical data, and actual impact of prior filing fees, CHSWC did recommend that a filing fee be initiated for all future liens. (See CHSWC (2011) Liens Report, Recommendation One, Page 11.) Despite the twenty-eight (28) clear recommendations made by CHSWC, and without adequate consideration of the ramifications or constitutionality of the process imposed by the retroactive lien "activation" fee, the Legislature added the lien "activation" fee for all liens filed before 2013. (§ 4903.06(a)(1).) "Activation" fees are very different from filing fees in that the Legislature gave fair warning that all future lien filings will require a fee. "Activation" fees impact liens that were previously filed under established law and procedure. At the time the liens were filed, there was no filing or "activation" fee required. The retroactive "activation" fee literally blindsides an entire industry with a retroactive cost that was never anticipated or required. If previously filed and perfected liens are not

² As mandated by sections 75 and 77, CHSWC is a joint labor-management body. CHSWC is charged with the ongoing examination of the health and safety and workers' compensation system, as defined in Section 4 of Article XIV of the California Constitution, and to conducting research and present administrative or legislative modifications to improve California' workers' compensation system.

1 activated by January 1, 2014, they will be dismissed by operation of law. (§
2 4903.06(a)(5).)

3 IV.

4 **Lien Activation Fee as a Basis for Constitutional Concern**

5 A.

6 **Procedural Due Process**

7 A lien is a property right entitled to Fifth Amendment due process
8 protection. (*United States v. Security Industrial Bank*, 459 U.S. 70, 75-76, 103 S.
9 Ct. 407, 410-11, 74 L. Ed. 2d 235 (1982); *Armstrong v. United States*, 364 U.S.
10 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960) (state law material-man's lien is a
11 property right compensable under fifth amendment); *Lynch v. United States*, 292
12 U.S. 571, 579, 54 S. Ct. 840, 843, 78 L. Ed. 1434 (1934) (contract rights are
13 property rights compensable under the Fifth Amendment). To the extent it is
14 entitled to due process protection, that protection focuses on assuring access to
15 fair procedures for its prosecution. The notion of due process relevant to causes of
16 action in that "deprivation . . . by adjudication [must] be preceded by notice and
17 opportunity for hearing appropriate to the nature of the case." (*Mullane v. Central*
18 *Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656, 94 L. Ed. 865
19 (1950).) The imposition of an "activation" fee deprives the lien-holder access to
20 the courts if it does not pay the \$100 fee by January 1, 2014. Furthermore, the
21 creation of section 4903.07 does not provide adequate access to the Court because
22 it requires several conditions precedent that were previously nonexistent and
23 forces the matter to a full trial to obtain recovery of the \$100 fee.
24

25 Because of the retroactive activation fee requirement occurring January 1,
26 2014, many members of CSIMS and CWCSA will be deprived of their
27
28

1 opportunity to be heard, because due to the financial costs, they will not even
2 make it to Court and incur an automatic dismissal without a hearing.

3 *Amici* urge the Court to grant Plaintiffs' request for preliminary injunctive
4 relief. Plaintiffs are owners of previously filed and perfected liens within the Act.
5 Proposed *amici* CSIMS and CWCSA represent numerous medical and/or service
6 providers, who have previously filed, perfected, sold and/or used liens as
7 collateral to obtain funding. CSIMS and CWCSA members range from Qualified
8 Medical Examiners (QME) who perform statutorily required medical-legal
9 evaluations, to language interpreters who assist the physicians to communicate
10 with injured workers. All *amici* services are related to carrying out the Act's
11 primary constitutional goal: providing the quality medical care and support
12 necessary to ensure injured workers obtain the statutorily enumerated benefits to
13 which they are entitled. Most of CSIMS' and CWCSA's members have been
14 long-term participants in the workers' compensation system. Over the years,
15 CSIMS and CWCSA members have filed and statutorily perfected millions of
16 dollars in medical and service liens that remain active and pending. Because of the
17 long term and well-defined laws existing prior to 2013, CSIMS and CWCSA
18 members have structured their business practice and/or assigned their liens in
19 order to obtain financing based on the requirements of the Act. The imposition of
20 an "activation" fee will destabilize previously negotiated contractual relationships
21 executed prior to the creation of a lien "activation" fee. As a direct impact on prior
22 financial assignment responsibilities and costs, the lien activation fee is a nonstop
23 impairment on previously negotiated and constitutionally protected contracts.
24

25
26 (See, *Russell v. Sebastian* (1914) 233 U.S. 195, 210 [58 L.Ed. 912, 923-924, 34
27 S.Ct. 517]).
28

B.

**Implementation of the Activation Fee Results
In Three Separate Acts of Impermissible Taking of Property Rights**

It has long been recognized that the “ancient institution of property” is intended to protect those claims upon which people rely. (*Perry v. Sindermann*, 408 U.S. 593, 601, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 262, 25 L. Ed. 2d 287, 90 S. Ct. 1011, and n. 8 (1970); *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976).) The reliance upon property rights must not be arbitrarily undermined. (*Id.*)

Section 4903.06 presents three (3) forms of unconstitutional taking of property. First, the requirement of payment of an activation fee on previously perfected liens is a direct taking of \$100 from the lien holder. Speaking at the *California Coalition on Workers’ Compensation’s 11th annual Conference, Legislative and Educational Forum*, named defendant Department of Industrial Relations Director, Christine Baker stated that as of July 19, 2013, over 15 million dollars had been collected from the imposition of the retroactive filing fee of § 4903.06.³ (Source: WorkCompCentral; *Baker Says Lien Fees to Offset Employer Assessments*: WEST [2013-07-19].⁴ Ms. Baker’s statement in July related to the start up of the Activation Fee for cases that had been brought to hearing in the first six months of 2013. (§ 4903.06(a)(4). *Amici* estimate that because all liens in the system, filed before 2012, must be activated by 2014, the amount taken from

³ The retroactive \$100 “activation fee of § 4903.06(a)(1) applies to individual cases on liens that come to hearing in the calendar year 2013. The retroactive \$100 activation fee must be paid for all outstanding liens filed before 2013 no later than January 1, 2014 or face dismissal by operation of law pursuant to § 4903.06 (a)(5).

⁴ WorkCompCentral.com is an industry publication that covers all aspects of state specific and national news matters involving workers compensation.

1 medical providers will exponentially expand because Ms. Baker's statement
2 reflects only a small percentage of the lien population activated during program
3 start up. As an unplanned, unforeseen and retroactive expense imposed on
4 previously perfected liens, the financial taking of a retroactive \$100 "activation"
5 fee on each lien filed prior to 2013, is a loss of financial resources, and an increase
6 in operational overhead that, as of January 1, 2014, will financially devastate the
7 lien population.

8 The second property taking is that of the very lien itself by §4903.06(a)(5).
9 A lien confers the basis for initial jurisdiction and standing. (§4903 et. seq.
10 California Code of Regulations, Title 8, section 10210, subsection (y).) Without
11 this lien notice, the services constituting the lien itself would not be recognized by
12 the Workers' Compensation Act. As the foundational platform to support a
13 request for reimbursement, the lien itself is a unique specie of property that is
14 protected by the *Due Process Clause of the Fourteenth Amendment*. (See, e.g.,
15 *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485, 99 L. Ed.
16 2d 565, 108 S. Ct. 1340 (1988).) Because the resolution of pending liens
17 determines the scope of the claimants' property interests, the Constitution requires
18 that the procedure be fair. (*Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 71 L.
19 Ed. 2d 265, 102 S. Ct. 1148 (1982).) If lien claimants cannot afford to pay a
20 previously un-required fee to present their cases to the court, they are unable to
21 avail themselves to the procedural mechanisms inherently required by the
22 opportunity for due process as the lien will be dismissed by operation of law under
23 subsection (a)(5) of 4903.06.
24

25 Finally, the liens of CSIMS and CWCSA members serve as the basis for
26 investment backed expectations. Existing liens have been sold and/or utilized to
27 finance practice operations. (See e.g., §4903.8) The imposition of an unforeseen,
28

1 retroactive, cumulative “activation” fee directly impacts financial agreements that
2 were negotiated prior to 2013.

3 In sum, the amendment to section 4903.06 is a substantive change. The
4 requirement of payment of a \$100 “activation” fee affects the substantive rights of
5 the lien holder because the activation fee is a financial encumbrance impacting the
6 economic viability of the lien holder. Specifically, existing funds to which the lien
7 holder is entitled, namely the \$100 that was not previously required, have been
8 taken away. New costs have been imposed on the lien holder which did not
9 previously exist. As a result, the lien claimant’s constitutional guarantee to due
10 process has been lost because retroactive costs are being imposed on previously
11 perfected rights. Furthermore, the actual lien will be lost if the lien claimant
12 cannot afford to pay the massive, cumulative, retroactive fees due by January 1,
13 2014. Finally, the cumulative cost of the imposition of the activation fee is not
14 only going to destroy the lien claimant’s holdings, it is going to directly destroy
15 previously vested rights that have served as the basis for subsequent contracts and
16 financial considerations because prior liens have been sold and/or assigned to
17 finance business practices.
18

19 V.

20 **The Proposed Remedy of Section 4903.07 is Illusory**

21 The proposed remedy to recoup lien “activation” fees is simply not sufficient
22 because the remedial process detailed in Section 4903.07 imposes new obligations
23 where they did not previously exist. Recovery of an individual case lien
24 “activation” fee may only be obtained after numerous conditions are completed
25 and a full trial conducted to obtain a sum equal or greater to a single settlement
26 demand that does not include statutory interest or allowable increases. (See,
27 §4903.07(a)(3)). The procedure detailed by subsection (a)(3) increases litigation
28

1 in direct contradiction to the goals of the legislative amendments. The imposition
 2 of additional conditions and the need to litigate to final judgment directly impairs
 3 the expeditious settlement of cases. Finally, section 4903.07 is a fatally flawed
 4 remedy because the financial costs of the massive lien “activation” fee payments
 5 required by January 1, 2014 will never be recouped by the separate trial of each
 6 individual case.

7
 8 **VI.
 Don’t Destroy the System**

9 California Courts have long recognized the difficult balance between the
 10 need to protect the workers’ compensation system while preventing abuse by
 11 those who fabricate or inflate claims. (See, e.g., *American Psychometric*
 12 *Consultants* (1995) 36 Cal. App. 4th 1626; 43 Cal. Rptr. 2d 254 and *Ameri-*
 13 *Medical Corp. v. WCAB*, (1996) 42 Cal. App. 4th 1260, [50 Cal. Rptr. 2d 366].)
 14 The need to protect medical service providers to ensure that injured workers will
 15 continue to receive competent medical care remains a compelling State interest. In
 16 keeping with the constitutional objective of providing workers’ compensation
 17 benefits expeditiously, the Court in *American Psychometric, supra*, recognized
 18 that:

19 It is of more than theoretical importance in the workers’ compensation
 20 system that medical providers be paid promptly and treated fairly, for
 21 without them the entire benefit system would fail.

22 Id. 42 Cal. App. 4th at 1640; 43 Cal. Rptr. 2d at 264.
 23

24 The imposition of a retroactive “activation” fee upon the very medical
 25 evaluators and service providers that represent the backbone of California’s
 26 workers’ compensation system seems to clearly forget, or at least not recognize,
 27 that “medical providers not only render necessary services, they operate
 28

1 businesses.” *Id.* 42 Cal. App. 4th at 1640; 43 Cal. Rptr. 2d at 264. No business
2 could operate with the imposition of unplanned, cumulative, retroactive
3 “activation” fees that were never before required. The situation is made even direr
4 when it is observed that if the business does not pay the retroactive fees by
5 January 1, 2014, its entire accounts receivables will be eradicated. (§
6 4903.06(a)(5).) The retroactive activation fee imposed on a targeted portion of
7 medical providers is analogous to imposing “activation” fees on small businesses
8 incorporated in California even though these fees were never before required,
9 cumulative, retroactive, unforeseen, span an untold number of years, and are
10 based on the number of transactions that have occurred. No one can plan their
11 finances under the threat of unforeseen retroactive fees. Not doctors, not
12 interpreters, not copy services and not any other California business would be able
13 to survive imposition of retroactive fees for past acts.

14
15 Compounding the harm caused by retroactive “activation” fees is the
16 recognition that in the majority of lien cases at issue; many years of time have
17 passed between the date of service, the date of the lien filing, and now the
18 imposition of an “activation” fee. Because medical providers and other lien
19 holders do not have the legal standing to initiate proceedings while the underlying
20 case in chief remains unresolved (§4903.5(c)), it is truly not uncommon to see
21 liens for services dating back to 2003 to finally come to hearing a decade after the
22 service was provided. As recognized by the creation of new “lien assignment”
23 rules, due to the long passage of time in contested cases, many providers have had
24 to sell their liens to finance their practice. (§4903.8). Not only are the retroactive
25 “activation” fees going to disrupt the transactional stability of many California
26 practices, it is going to interfere with economic transactions and substantial
27 business financial adaptations and changes in financial position. The foundational
28

1 importance of transactional stability has been recognized as an underpinning of
2 the entire workers' compensation system. (*American Psychometric Consultants*,
3 supra 36 Cal. App. 4th 1643.) As explained by the Court, it has to be possible to
4 eliminate fraudulent lien claims without destroying the entire workers'
5 compensation system. (Id. at 1647.) The Court in *American Psychometric*
6 *Consultants*, supra, the Court noted that "[o]f most concern here is the element of
7 transactional stability. We believe transactional stability an important element of
8 any benefit system." (Id.)

9 Concerning the impact of section 4903.06, amici believe that the retroactive
10 application of an "activation" fee on individuals liens that span decades of time
11 should be viewed as an impact that is so negative that the transactional instability
12 resulting from the imposition of unforeseen costs would adversely impact the
13 entire Act and cause all injured workers who require service to be shunned and
14 viewed as undesirable. Additionally, if all past medical and ancillary services
15 providers can be wiped out by the creation and retroactive application of an
16 "activation fee" what is going to protect future providers from harm? Allowing
17 section 4903.06 to stand is synonymous to declaring that any participant in the
18 workers' compensation system, injured worker, physician, copy services,
19 interpreters, transportation services, applicant attorney or employer is subject to
20 future random and arbitrary cost and fees that did not exist at the time of service
21 was provided. "No one can operate a business on receipts only conditionally
22 possessed, and medical providers are no exception." *American Psychometric*
23 supra, at 1647.

24
25 ///

26 ///

27 ///

Conclusion

With the expectation that their property rights would be protected by the Constitution from unreasonable takings, and that they would be afforded equal protection and due process, Amici CSIMS and CWCSA members have provided medical treatment, evaluation, copy service, interpretation and transportation support and pharmaceutical goods worth hundreds of millions of dollars. The retroactive lien “activation” fee presented by section 4903.06 imposes new costs and procedural requirements that did not exist at the time CSIMS and CWCSA members filed their liens. It relates back to past acts and must be paid for prior decades of services by January 1, 2014. If all past liens are not “activated”, they will be dismissed by operation of law by 4903.06(a)(5).

It is respectfully noted that Amici’s members would not have provided services on a lien basis if these “activation” fees were known to exist. Lien claimants expect transactional stability and protection by State and Federal Constitutionally conferred rights. The imposition of a retroactive “activation” fee requiring massive cumulative payment by January 1, 2014 tramples the concepts of constitutionally protected property rights and entitlement to due process and equal protection. The proposed remedy under 4903.07 is illusory as it requires acceptance of an amount less than owed, and fails to recoup the massive costs of cumulative payment by January 1, 2014.

Respectfully submitted,

Dated: October 2, 2013

By: 

DAVID BRYAN LEONARD, ESQ. [SBN 147246]

Counsel for the Proposed Amici Curiae


California Society of Industrial Medicine and Surgery, Inc. and

The California Workers’ Compensation Services Association, Inc.

CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitations of 9th Cir. R. 29-2(c)(2) because the petition contains 3,890 words, excluding the parts of the petition exempted. The petition complies with the typeface requirements of 9th Cir. R. 29-2(c)(1) and the type style requirements of 9th Cir. R. 29-2(c)(1) because the petition has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface.


Dated: October 3rd, 2013

By: 
DAVID B. LEONARD
Attorney For Amici

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 3, 2013. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.


Dated: October 3, 2013

By: 
DAVID B. LEONARD
Attorney For Amici

CERTIFICATE OF DIGITAL SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Ninth Circuit Court District by using the appellate CM/ECF system on October 3, 2013. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. There are no known non-participants.

Dated: October 3, 2013

By: 
DAVID B. LEONARD
Attorney For Amici